FILED
MAY 23 1986
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CLERK

85 - 1927
No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

VICKIE JEAN RATLIFF PECK,
individually and as Administratrix of the Estate of
HOLLEY MICHAEL RATLIFF, deceased, acting by
and through his heir at law and Administratrix,
Vickie Jean Ratliff,
Petitioners (Appellants Below),

vs.

THE M/V MORRIS HARVEY, M/V #265183,
a registered diesel towboat, MADISON COAL AND
SUPPLY, INC., a corporation, PRIVATE
PLEASURE BOAT WV, 7380, AB, a registered
small craft, PAUL KESSINGER,
Respondents (Appellees Below).

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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May 23, 1986

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1206

Vickie Jean Ratliff Peck, individually and as administratrix of the estte of Holley Michael Ratliff, deceased and the Estate of Holley Michael Ratliff, deceased, acting by and through his heir at law and administratrix, Vickie Jean Ratliff,

Appellants,

versus

The M/V Morris Harvey, M/V #265183, a registered diesel tugboat; Madison Coal and Supply, Inc., a corporation; Barge #C-239, (O.N. 503271), a registered hopper-freight barge; Private Pleasure Boat WV 7830 AB, a registered small craft; Paul Kessinger and Clyde Hammack, Jr.,
Appellees,

and

Crounse Corporation, a corporation,

Defendant.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. Dennis R. Knapp, Senior District Judge. (C/A 82-2441).

Argued: February 4, 1986 Decided: March 24, 1986

Before MURNAGHAN and ERVIN, Circuit Judges, and KELLAM, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Steven L. Miller for Appellants; A.L. Emch (Robert L. Stewart; W. T. Shaffer; Jackson, Kelly, Holt and O'Farrell on brief) for Appellees.

PER CURIAM:

The facts of the appeal arouse sympathy for the plaintiffs, the widow of Holley Michael Ratliff suing in several guises, individually and as personal representative. However, the plaintiffs had their full day in court before a jury which, properly charged, the instructions considered as a whole, found in favor of the principal defendant.[1] As for the other defendant,[2] the plaintiffs complain on appeal of the verdict obtained against him as inadequate in amount.

Ratliff, plaintiffs' decedent, put forth in Charleston, West Virginia on the Kanawha River at or shortly before

[1]That is Madison Coal and Supply, Inc. References to it will be deemed to encompass Clyde Hammack, Jr., an employee of Madison, and Crounse Corporation, the owner of a barge under Madison's control.

[2]Paul Kessinger

2:00 A.M. on August 31, 1980, the Sunday of the Labor Day weekend. He did so in a pontoon boat, 24 feet long and 8 feet wide. Not under power, drifting downstream, the pontoon boat found itself in a position of imminent danger of collision with the lead barge in a tow of five being pushed upriver by a tug owned by Madison. An already distressing situation became worse when Kessinger, the owner-operator of the pontoon boat, was unable to start the engine. In the ensuing collision, and its immediate aftermath, Ratliff drowned. His alcoholic blood level at autopsy was .22% by weight, considerably above the .10% which West Virginia defines as *prima facie* evidence that an individual driving an automobile is under the influence. W.Va. Code § 17-C-5–8.

Despite the plaintiffs' contention to the contrary, they were not entitled to a directed verdict against Madison as to liability, and the jury instructions did not incorrectly submit the case. A directed verdict is inappropriate where the evidence suffices to raise a jury question of material fact. *Bryan v. Merrill, Lynch, Pierce, Fenner & Smith,* 565 F.2d 276, 281 (4th Cir. 1977); *Wratchford v. S.S. Groves & Sons Co.,* 405 F.2d 1061, 1066 (4th Cir. 1969).

Plaintiffs' contention that there was a violation by the tow of the duty under 33 U.S.C. § 210 to stay to starboard affords no substantial basis for a grant of a directed verdict. The evidence of just where in the river the tow and the tug were located was by no means clear and convincing, nor was there proof that the channel was narrow at the point of the collision, a requirement of 33 U.S.C. § 210.[3] Moreover the contention does not merit our atten-

[3] In narrow channels every steam vessel shall, when it is safe and practicable keep to that side of the fairway of mid-channel which lies on the starboard side of such vessel.

33 U.S.C. § 210. That statute was repealed, effective December 24, 1981. However, its function was assumed by replacement legislation, 33 U.S.C. § 2009.

tion, in any event, having for the first time been introduced at the appellate level and there being no exceptional circumstances to excuse the raising of the issue at the trial level. *Babb v. Olney Paint Co.*, 764 F.2d 240, 244 (4th Cir. 1985).

The requirement placed on a vessel operator to maintain a proper lookout does not necessitate, as a flat and unyielding obligation, the unvarying posting of a lookout in the bow of the forward barge. *Osaka Shosen Kaisha, Ltd. v. Angelos, Leitch & Co.*, 301 F.2d 59, 61 (4th Cir. 1962) ("the question of the sufficiency of the lookout in any instance is one of fact, to be resolved under the attendant circumstances . . . ."). Furthermore, breach of the duty to post "proper lookout" is not the equivalent of a statutory violation. *E.A. Anthony v. International Paper Co.*, 289 F.2d 574, 580 (4th Cir. 1961). Appellant's expert acknowledged that there is no rule or requirement mandating a lookout at the head of the tow.

Moreover, the furthest that the authorities go in support of the appellants' position is to hold that the failure to post a proper lookout raises an inference, albeit a strong one, imposing a burden on the operator of the vessel to demonstrate that any resulting breach of duty did not contribute to the accident. *District v. Lauritzen,* 404 F.2d 1001 (4th Cir. 1968); *Esso Standard Oil Co. v. Oil Screw Maluco I,* 332 F.2d 211, 213 (4th Cir. 1964).

Consequently, the matter remained one of fact. Since it was a disputed one, a directed verdict was not called for. The evidence indicated that the tug maintained as lookouts on the bridge the helmsman on the starboard side and the deck engineer on the port. Both were attending to their lookout duties at the time of the collision.

Turning to the claim that evidence of Ratliff's intoxica-

tion was improper, it is evident that, in such a state, Ratliff was foolhardy to have placed himself in the position he was in. The jury could properly infer that, conscious when he fell or was knocked overboard, he would have survived were it not for the diminished capacity induced by the influence of alcohol.

Accordingly, we are satisfied that the district court acted well within its discretion, insofar as Madison was concerned, in denying a directed verdict, a judgment N.O.V. or a new trial.

As for the supposed inadequacy of the damages allowed against Kessinger wee are troubled by the fact that he appeared *pro se* at trial, and took no part in briefing and arguing the appeal. At the same time, the indications are there that attacking the problem may prove, pragmatically if not legally, a futile exercise on our part. Nevertheless, the award has evident defects, being, within pennies, exactly 25% of the funeral expenses of $1,965.66, or $491.40. Kessinger had been deemed 25% responsible fo the fault, Ratliff, 75%.

The award in other words was infinitesimally less (by 1-1/2 cents) but, nevertheless, less than the proportionate share of funeral expenses for which Kessinger was liable. Unless we accept the improbability that actually some of the damages awarded against Kessinger concerned his special damages and not the funeral expenses, that left no damages whatever for anything save funeral expenses. We are most reluctant to opine that Ratliff was worth as much or even 1-1/2 cents more dead than alive. In the customary case, therefore, we should be disposed to find that there had been an abuse of discretion in the failure to grant a new trial against Kessinger, limited to damages, with the allocation remaining fixed at 75% of the fault attributable

to Ratliff, 25% to Kessinger. *Cf.* 6A *Moore's Federal practice* ¶ 59.08[6] pp. 59-179-181.

However, there is a genius behind the common law's insistence on approaching matters, even, or perhaps sometimes especially, matters of principle, one at a time. Kessinger had appeared at trial *pro se.* The attention spent on him was scant, as evidenced by the fact that appellant's combined motions for directed verdict, for judgment notwithstanding verdict, and for a new trial only, as a matter of ritual, devoted but six lines out of five full pages to "the further and additional grounds that the damages awarded by the jury, being the stipulated necessary and reasonable funeral bills of the plaintiffs' decedent and being less than the uncontradicted special damages proved by plaintiffs are clearly inadequate as a matter of both law and fact."

The assessment by counsel for Madison of Kessinger as presenting himself to the jury at trial as a man without significant financial resources has gone uncontradicted by appellants. That does not suffice as a reason for the jury to reduce its assessment of damages to the vanishing point. No more could the jury properly have refused any damages because of the fact that Ratliff's widow remarried within six months of the fatal accident. Still those considerations may properly have influenced a busy district judge not to engage the limited resources of an overextended court in trying a case in which, whatever the outcome, it would, as a practical matter, have little or no significant effect. With some hesitancy, therefore, we conclude that the district judge, clearly within his discretion in denying a new trial against Madison, did not abuse it in refusing to resurrect the damages issue with respect to Kessinger.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

No. 85-1206

VICKIE JEAN RATLIFF PECK, Individually and as administratrix of the estate of HOLLEY MICHAEL RATLIFF, deceased and the Estate of HOLLEY MICHAEL RATLIFF, deceased, acting by and through his heir at law and administratrix, Vickie Jean Ratliff,

ENTERED

AUG 14 1984
ORDER BOOK
NO 112 PAGE 58

Plaintiffs,

Vs. Civil Action No. 82-2441,

THE M/V MORRIS HARVEY, M/V #265183, a registered diesel tugboat, MADISON COAL AND SUPPLY, INC., a corporation, BARGE # C0239, (O.N. 503271), a registered hopper-freight barge, PRIVATE PLEASURE BOAT WV 7830 AB, a registered small craft, PAUL KESSINGER, CLYDE HAMMACK, JR.,

Defendants.

JUDGMENT ORDER

This action came on for trial before the Court and a jury, Honorable Dennis R. Knapp presiding, and the

issues having been duly tried and the jury having duly rendered its verdict,

It is ORDERED and ADJUDGED that the plaintiffs, Vickie Jean Ratliff Peck, Individually and as administratrix of the estate of Holley Michael Ratliff, deceased, and the estate of Holley Michael Ratliff, deceased, acting by and through his heir at law and administratrix, Vickie Jean Ratliff, recover of the defendant, Paul Kessinger, the sum of $491.40, with interest thereon at the rate of 11.93% as provided by law, and plaintiffs' costs of action.

Further, it is ORDERED and ADJUDGED that the plaintiffs take nothing from defendant, Madison Coal and Supply, Inc., and that Madison Coal and Supply, Inc., recover of the plaintiffs its costs of action.

It is further ORDERED that this action be dismissed with prejudice and stricken from the docket.

The Clerk is directed to mail certified copies of this order to counsel of record herein.

DATED: August 13, 1984

/s/

DENNIS R. KNAPP, JUDGE

A TRUE COPY, Certified this
15th day of August 1984
RONALD D. LAWSON, CLERK

By_____
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
WEST VIRGINIA AT CHARLESTON

No. 85-1206

VICKIE JEAN RATLIFF PECK, Individually and as administratrix of the estate of HOLLEY MICHAEL RATLIFF, deceased and the Estate of HOLLEY MICHAEL RATLIFF, deceased, acting by and through his heir at law and administratrix, Vickie Jean Ratliff,

Plaintiffs,

Vs. Civil Action No. 82-2441,

THE M/V MORRIS HARVEY, M/V #265183, a registered diesel towboat, MADISON COAL AND SUPPLY, INC., a corporation, BARGE #C-239, (O.N. 503271), a registered hopper-freight barge, CROUNSE CORPORATION, a corporation, PRIVATE PLEASURE BOAT WV 7830 AB, a registered small craft, PAUL KESSINGER, CLYDE HAMMACK, JR.,

Defendants.

FILED
AUG 13 1984
IN CLERK'S DIST. of W.VA.
Ronald D. Lawson, Clerk

PLAINTIFFS' MOTION FOR DIRECTED VERDICT MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT MOTION FOR A NEW TRIAL

TO MADISON COAL AND SUPPLY, INC., a corporation, and ALVIN L. EMCH, its counsel of record and PAUL KESSINGER, JR., acting *pro se*

Pursuant to Rule 50(a) of the Federal Rules of Civil Procedure, the plaintiffs hereby renew their motion for a directed verdict made in open court at the close of the evidence offered by the defendants Paul Kessinger and Madison Coal and Supply, Inc. and further move the Court pursuant to Rule 50(b) of the Federal Rules of Civil Procedure for judgment notwithstanding the verdict, all on the grounds that the plaintiffs' evidence established without contradiction that the defendant Madison Coal and Supply, Inc., failed to post a bow lookout upon the head of their tow while transiting the congested waters of the Kanawha River at its confluence with the Elk River, the docking areas between the City of Charleston levee and the C & P Telephone Company dock and boat ramp, that defendant Madison through its agents and employees, by such employees' own admission, failed to detect the boat in which plaintiffs' decedent was a passenger, with the result that a collision occurred between plaintiffs' decedent's said boat and defendant Madison's tow. Defendant Madison offered no explanation or excuse for its failure to post such bow lookout and defendant Madison's omission to perform its duty to post a bow lookout is so grave a default as to give rise to a strong inference that it contributed to the collission and to impose upon defendant Madison and its vessel, M/V Morris Harvey, the heavy burden to show by clear and convincing

evidence that said defendant's failure to post a bow lookout did not contribute to cause the collision, which burden defendant Madison wholly failed to meet.

(See Chesapeake Bay Bridge and Tunnel District v. Lauritzen (CA 4 1968) 404 F.2d 1001 at pages 1001 and 1007; Anthony v. International Paper Company (CA 4 1961) 289 F.2d 574 at page 581; Esso Standard Oil Company v. Oil Screw Tug Maluco I (CA 4 1964) 332 F.2d 211) Since defendant Madison failed to meet its heavy burden and failed to produce clear and convincing evidence, or any evidence whatsoever, justifying or excusing its failure to post a bow lookout, the plaintiffs are entitled to judgment against defendant Madison Coal and Supply, Inc., as a matter of law. By way of further grounds for plaintiffs' said motions for directed verdict and judgment notwithstanding the verdict, plaintiffs hereby urge the Court that the plaintiffs' uncontradicted evidence established that, prior to the collission, defendant Madison failed to post as lookout any person having exclusively lookout duties. In particular, the pilot of M/V Morris Harvey testified that he served as starboard lookout from the pilot house while piloting the M/V Morris Harvey, operating its rudder and throttle controls, operating its searchlight, monitoring the dials and gauges of its console, monitoring its radar and radio, making log entries and otherwise performing numerous functions beside that of lookout. Such failure of M/V Morris Harvey to maintain a proper lookout was, a matter of law, an effective contributing cause of the collision which occurred on the starboard front quarter of the head of M/V Morris Harvey's tow, as to which area pilot Clyde Hammack, Jr., had, as aforesaid, unlawfully charged himself with the responsibility of acting as lookout. Defendant Madison's failure to post a proper starboard lookout (or port lookout for

that matter) having exclusively lookout duties entitles plaintiffs to judgment against defendant Madison as a matter of law. See Interstate Towing Co. etc. et al. vs. Stissi (CA 2 1983) 717 F.2d 752 at page 754-]755; Faust vs. South Carolina State Highway Deparetment et al. (CA 4 1983) 721 F.2d 934 at page 947; U.S.A., owner of USS Darby vs. SS Soya Atlantic (CA 4 1964) 330 F.2d 732 at pages 732 and 735.

For the foregoing reasons and for other reasons hereinafter set forth, plaintiffs further move the Court pursuant to Rule 59 of the Federal Rules of Civil Procedure for a new trial on the issues of liability and damages as to both Madison Coal and Supply Company, Inc., and Paul Kessinger on the grounds that the foregoing errors of law prejudiced the plaintiffs in the presentation of their case against Madison Coal and Supply Company, Inc. to the jury. In support of their motions, plaintiffs urge the further and additional grounds that the Court's error in failing to grant paragraphs 2, 3, 4, and 5 of the plaintiffs' Motion in Limine resulted in prejudice to the plaintiffs' as a matter of law and upon the further and additional grounds that the damages awarded by the jury, being the stipulated necessary and reasonable funeral bills of the plaintiffs' decedent and being less than the uncontradicted special damages proved by plaintiffs, are clearly inadequate as a matter of both law and fact. Plaintiffs urge the further and additional grounds that the Court's failure properly to instruct the jury to disregard the prejudicial testimony of West Virginia State Medical Examiner, Doctor Irvin Sopher with respect to the West Virginia State Motor Vehicle Standards for Intoxication and with respect to the said witness' opinions regarding the alleged high incidence of alcohol consumption in other boating and swimming fatalities directly resulted in ir-

remediable prejudice to the plaintiffs and directly resulted in the irrational and erratic verdict of the jury which exhibits both passion and prejudice, with respect to the issues of liability and damages. The plaintiffs further urge in support of their motion for a new trial that the jury's written question, directed to the Court, with respect to the issue of joint and several liability of the defendants, clearly demonstrates the willful refusal of the jury to follow the instructions of the Court with respect to assessing comparative negligence and determining damages. Further, the Court's failure to grant the plaintiffs' their requested cautionary instruction with respect to the testimony of Doctor Irvin Sopher and with respect to consumption of alcoholic beverages upon navigable rivers such as the Kanawha River further prejudiced the plaintiffs and irreparably tainted the jury's verdict, requiring that a new trial be granted upon the issues of both liability and damages as to Madison Coal and Supply Company, Inc., and Paul Kessinger.

Vickie Jean Ratliff Peck,
individually and as Administratrix of the Estate
of Holley Michael Ratliff

By Counsel

STEVEN L. MILLER
Counsel for Plaintiffs
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Cross Lanes, WV 25356

APPENDIX C

[467] UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

VICKIE JEAN RATLIFF PECK,
etc.,

Plaintiffs,

vs. CIVIL ACTION NO. 82-3673

THE M/V MORRIS HARVEY,
et al.,

Defendants.

PLAINTIFFS' INSTRUCTION NO. 4

The Court instructs the jury that the master and pilot of the M/V Morris Harvey are presumed to have received a Coast Guard Notice to Mariners advising caution in transiting congested areas and advising the posting of a lookout on the front of their barges in transiting congested areas during the Labor Day weekened.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

VICKIE JEAN RATLIFF PECK, et al.

Plaintiff,

vs. Civil Action No 82-2441

THE M/V MORRIS HARVEY, et al.

PLAINTIFFS' REQUESTED CHARGE NO. 9

The Court instructs the jury as follows:

A vessel has a duty to keep a lookout and to watch where it is going and it is bound to observe reasonably visible conditions along the way and to notice what is before it for a reasonable distance, and if it fails to keep such a lookout or fails to watch where it is going or fails to notice what is before it for a reasonable distance, such failure constitutes negligence.

Furthermore, a vessel is under a duty to post a bow lookout; that is, a lookout who is stationed at the extreme forward point of the vessel and, in the case of a tug and tow, at the extreme forward point of the tow. Omission to perform this duty to post a bow lookout is so grave a default as to give rise to a strong inference that it contributed to the collision and to impose upon the vessel the heavy burden to show by clear and convincing evidence that its failure to post a bow lookout did not so contribute to cause the collision.

[468] Therefore, if you believe that the pilot of the M/V Morris Harvey, Clyde Hammack, Jr., failed to post a bow lookout or failed to watch where the Morris Harvey was

going or failed to notice what was before his tug and tow of barges for a reasonable distance and, as a result, that he and watchman Andrew Cogis failed to observe Paul Kessinger's pontoon boat before the collision occurred, then such failure, if any, constitutes negligence on the part of Clyde Hammack, Jr. * * * a preponderance of the evidence in this case that Clyde Hammack, Jr. was acting within the scope of his employment as employee of Madison Coal and Supply Company, and that such failure, if any, on the part of Clyde Hammack, Jr. proximately caused or contributed to cause the death of Holley Michael Ratliff, then such failure, if any, on the part of Clyde Hammack, Jr. constitutes negligence on the part of the defendant Madison Coal and Supply Company and if you further believe that such negligence, if any, proximately caused or contributed to cause the death of Holley Michael Ratliff, then you may find in favor of the plaintiffs and against the defendant, Madison Coal and Supply Company, Inc.

Myers v Union Pacific RR. Co., No 83-2586 (CA 8 decided 7/6/84) ____F2d ____

Chesapeake Bay Bridge and Tunnel District v Lauritzen (CA 4 1968) 404 F2d 1001 (headnotes 7 and 8) at pages 1001 and 1007

Anthony v International Paper Company
(CA 4 1961) 289 F2d 574 at page 581

Esso Standard Oil Company v Oil Screw Tug Maluco I
(CA 4 1964) 332 F2d 211

[471] IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

VICKIE JEAN RATLIFF PECK, etc., et al.
Plaintiff,

v. Civil Action No 82-2441

THE M/V MORRIS HARVEY, et al.

PLAINTIFF'S REQUESTED CHARGE NO 15

The Court instructs the jury that, in considering the testimony of Doctor Irvin Sopher and the other evidence and testimony in this case, there is no West Virginia law or regulation and no United States law or regulation which forbids or regulates the consumption of beer or other alcoholic beverage on a navigable river such as the Kanawha River, either by a passenger on a boat or vessel or by the owner or operator of a boat or vessel. In particular, the West Virginia motor vehicle laws have no applicability to a boat or vessel on the waters of the Kanawha River. Doctor Irvin Sopher was permitted to refer to the West Virginia motor vehicle laws regarding consumption of alcoholic beverages by the operators of motor vehicles merely for purposes of comparision or illustration and you should draw no inference whatsoever that such laws apply to Holley Michael Ratliff or any other passenger on Paul Kessinger's pontoon boat nor to Paul Kessinger himself, the owner and operator of the pontoon boat.

APPENDIX D

a) Origin of Broadcasts: Coast Guard Transmitter, Owensboro, Kentucky

b) "Due to the great number of recreational boats expected on the various rivers on the Labor Day weekend, especially in areas near cities, boat harbors and at the confluence of tributary rivers, commercial towboat operators are advised to transit these area with extreme caution. Operators should consider the use of a lockout at the head of their tows when transiting these areas."

c) By radio.

d) Transmissions:

Greenwich Time (2)		Local Time (CDT)	
August 30	1400-1404	August 30	0900-0904
August 30	1745-1757	August 30	1245-1257
August 31	0200-0213	August 30	2100-2113
August 31	1400-1405	August 31	0900-0905
August 31	1752-1756	August 31	1252-1256
September 1	0203-0209	August 31	2103-2109

f) Yes. 157.1 MHz (Channel 22)

APPENDIX E

[60] A. 10 or 12 feet.

Q. Okay, Now, what was, would be the normal height above the water of the Morris Harvey's pilot house back on August 1, 1980? A. I don't know her eye level.

Q. Do you know what the normal height of one of the decks on those motor vessel is? A. No, sir.

Q. Is it higher than 8 feet? A. Yes, sir.

Q. How much higher than 8 feet? A.I would have no idea.

Q. How big a blind spot, based on your experience, would you have expected the Morris Harvey to have, and I'm talking about a visual blind spot in front of that tow of barges, assuming that it was five empty barges in front of the Morris Harvey riding 10 feet out of river as you indicated, how long would you expect that that blind spot would have been in front of this lead barge back on August 31st, 1980? A. About 6 hundred feet, 7 hundred feet.

MR. MILLER: Your witness.

CROSS-EXAMINATION

BY MR. MILLER:

[61] about and asked you if there was anything unusual about it. And I believe you said any pilot would basically know that, or agreed with him any pilot would basically know that. That Notice or a very similar notice has been broadcast on previous Labor Day Weekends by the Coast Guard, had it not, sir? A. Yes, sir.

Q.And as a practical matter whether the notice had been broadcast or not advising the posting of a lookout on the front of a barge, you and other prudent pilots on the river

already knew that, didn't you? A. To post a lookout on the end of the barge.

Q. Yes, sir? A. In congested areas, yes.

Q. Yes, sir. Now, tell the jury what the purpose is of posting a lookout on the front of your tow of barges when you are passing through congested aras, why did you do that? Why does a prudent pilot do that? A. Because of your blind spot. They can see it, you can't.

MR. MILLER: No further questions.

RECROSS-EXAMINATION

BY MR. EMCH:

Q. Again, Mr. Simpkins, with respect to the broadcast that's been referred to, you didn't specifically remember that broadcast as we discussed? A. No, sir not word for word, no.

* * *

[152] * * * boat was located as you recall it. Could you label, if this is the Morris Harvey, would you label that Morris Harvey and would you label the front of the tow so we will know which is the front and which is the rear.

Now, were those jumbo or standard barges that you were pushing or was it a mixture of the two kinds? A. It was jumbos.

Q. Five jumbo barges? A. Yes.

Q. Tell the jury the dimensions, length and width, of a jumbo barge, if you would? A. 195 feet long and 35 feet wide?

Q.Each barge is 195 feet long and 35 feet wide? A. Yes.

Q. Now those barges were unloaded that night, is that right? A. I don't know when it was unloaded. We picked them up empty.

Q.You picked them up empty. And you were pushing empty barges? A. Yes.

Q . Do you know what the distance was from the water line to the deck of one of those barges? A. Probably somewhere around, you know, depending, you know, the middle of the barge somewhere around 10 feet.

Q. 10 feet from the water line to the deck?

* * *

[154] Q. Why not.

MR. EMCH: Mr. Miller has introduce the Morris Harvey and the barges in question, I don't think from my looking at those photographs that the drawing he has made is anywhere near an accurate representation.

Q. Mr. Hammock, by all means change my drawing in any way you wish to change it to make it as accurate as you recall it. But is it your testimony that you simply don't know what you height of eye was above the water line? A. There s really no way of telling.

Q. Why not? A. There is a lot of different things, why not.

Q. Mr. Hammock, you had three 195 foot barges out ahead of you and you are looking like that from some point either seated or standing and you can't see, just like you can't see what is in front of the hood of a car, you can't see what is in front of three, 195 foot barges for some distance. Do you know what blind spot means? A. Yeah.

Q. Well, without knowing your height above the water, how could you have calculated and known how many hundreds of feet your blind spot consisted of? A. I didn't.

Q. You didn't know what your blind spot

was? A. No, I didn't calculate it. I will give an estimate.

* * *

[156] Q. As a matter of fact, that's done when you're, when you have got a concern about what might be in that blind spot; isn't it? A. Sometimes it is.

Q.But you didn't do it that night? A. No, sir, I didn't.

Q. Isn't posting a lookout at the head of a tow normally done when transiting congested areas? Doesn't a careful pilot do that when he knows he's going through a congested area? A. Not necessarily.

Q. Why not? A. They just don't.

Q. Why not? A. I can't tell you why, they just don't.

Q. Wouldn't it been safer to have somebody looking down in that blind spot when you are going through congested areas with little boats crossing back and forth?

MR. EMCH: Objection. Obviously if the witness thought it was safer he would have done it.

THE COURT: Sustained.

MR. MILLER: Well let's ask him that.

MR. EMCH: Well I made an objection.

Q. Wouldn't it have been safer to have posted a lookout?

MR. EMCH: Same objection.

THE COURT: Well, sustained.

Q. Your search light, was your search light mounted on the [157] roof of the pilot house of the Morris Harvey back on August 31st, 1980? A. Yes.

Q. And that was even higher than your eye, wasn't it? A. It was above me.

Q. Do you know how high above water your search light was located? A. I don't remember, you know, I

hadn't been on the boat since it was like that, since it was like it was then and you forget these things.

Q. Did you ever know how high your search light was above water? A. Well she has got an eye level of somewhere around 19 feet, meaning to the top of the mast.

Q. 19 feet to the top of the mast? A. Or somewhere in that area, I believe that's what it is, I'm not real sure, but it's somewhere in that area.

Q. 19 feet to the top of the mast and somewhere below the top of the mast we are going to find the search lights, right? A. Probably.

Q. And somewhere down below the search lights we are going to find your eyeball, right? A. Uh huh.

Q. Now, would you say that the search light was mounted three feet higher than your eye?

* * *

[165] A. Could you state that again, please?

Q. Did you not know that you were going to find a lot of small boats on the river that weekend? A. I knew there would be, you know, quite a few boats up there.

Q. Mr. Hammock, I would like to hand you something that's a copy of something, and I would like to ask you if you know what it is? A. Un huh.

Q. What is it? A. It looks like a radio log book.

Q. And do you see what the dates are? A. Un huh.

Q. What is the date at the top? A. Where at, there.

Q. You got several dates on? A. 8-26.

Q. Of what year? A.'80

Q. And what is the next date down? a. 27th.

Q. And the next date down? A. 28th, 29th, 30th.

Q. Are those your signatures all up and down the page? A. Just mine?

* * *

[169] Q. Not even when you were passing the Levy? A. Not out at the head of the tow.

Q. After the collision did you radio the Coast Guard at Owensboro, Kentucky? A. I called the Coast Guard, Ohio River Bridge.

Q. Is that at Owensboro, Kentucky? A. I believe it is.

Q. And did you get through to them okay? A. Yes, sir.

Q. Did they get back to you okay? A. It seems like they did. I don't remember right off.

Q. Well you want to look at your log? A. I talked to them.

Q. You know you talked to them they talked to you and you told them about the collision? A. Yes.

q. Did you have any radío dead spots that interfered with reception? A. Where.

q. When you talked to the Coast Guard in Owensboro, Kentucky? A. Not that I remember, we didn't.

Q. No problems with reception? A. No, sir. Not that I remember.

Q. Performance good? A. When I was talking to the Coast Guard?

* * *

[170] Q. Go on? A. "And I didn't see them with headlight." And that's all it says.

Q. Okay. Is that just, does that mean exactly what it says they didn't appear in the screen and you didn't see them with the headlight. A. I didn't.

Q. Okay. And that's until after the collision? A. I didn't — I told you when I seen the boat, when it come around the front side of the barge.

Q. Okay. What does the next line say? A. "Witness David Estep St. Albans, MBC hours.

Q. What did you learn? A. That's not my writing.

Q. That is somebody else writing? A. The Captain was up there then and that's when Mr. Estep came over or something.

Q. Okay. Next line down from that, what does that say? Is that your signature. A. Yes, I don't really. I can't tell if it is or not.

Q. Do you remember whether you made it or not? A. I don't really remember right off. All it says, only thing it said was "watchman in pilot house" is what I'm getting at. I don't remember if I wrote it or not. It don't look like my writing, really.

* * *

[174] attention to what I was doing. So undoubtedly I was looking out the window, or –

Q. You were watching where you were going, weren't you? A. Yes, sir.

Q.And you never saw it even when you hit it? A. No. I told you the only time I seen the boat is when it come around the corner of the barge.

Q. Well, you know at some point that pontoon boat entered your blind spot, didn't it? Or do you know? A. I don't know if it did or not, Buddy.

Q. Well you couldn't see it when you hit it, could you? A. I never did see the boat. I just told you that I didn't.

Q. Until it came down along the starboard side of your tow? A. I didn't say that either.

Q. Well, did it come down the starboard side of your tow, Mr. Hammock? A. I don't know. It come around the corner the starboard corner of that barge. That's the first time I saw it.

Q. Okay. Did you talk to Bill Simpkins, another pilot of Madison Coal & Supply as you passed the Levy on the

radio? A. I tried to call him, but I don't think I ever talked to him.

Q. Do you know why you were trying to call him? A. Not right off, I don't.

MR. MILLER: Your witness.

* * *

[197] THE WITNESS: Nothing.

THE COURT: That settles that very simply.

BY MR. MILLER

Q. I believe on Mr. Emch' cross-examination you said the pilot has a lot more duties than running the boat. Running the boats is his main job. That evening before the collison, Mr. Hammack, among your other duties were you operating the throttles of the boat. A. I was running the boat.

Q. Were you operating its throttles? A. I was runing the whole boat.

Q. Were you operating its throttles?

MR. EMCH: Your Honor.

THE COURT: Well, its pretty obvious.

MR. MILLER: Well, let him say so.

THE COURT: I don't see any need of encumbering the record. It's pretty obvious he was piloting a boat and that involved the use of the throttle and steering mechanism. He said that several times. He was in charge of the boat and operating it.

BY MR. MILLER:

Q. Were you operating the search lights as well as the throttle and rudder? A. You don't have to operate the throttle. Once

* * *

[198] A. Yes.

Q. Mr. Emch asked you that evening if you were putting the boat where you wanted it to go. You saw a small

boat between the Elk River and the South Side Bridge, did you not, sir? A. Yes.

Q. And that boat was anchored in the channel, wasn't it? A. I don't know if he was anchored or not. He wasn't moving.

Q. He was out in the channel stationary? A. Yes, he was.

Q. And you stopped for him? A. Yes.

Q. And you had no trouble seeing him? A. No, I didn't.

Q. Where was he, port? Starboard? A. Kind of toward the port, if I saw him right.

Q. Who saw him first, you or Mr. Cogis? A. I did, as far as I remember.

Q. When you are putting a boat where you wanted it to go, did you want it to go over that pontoon boat?

MR. EMCH: I object.

THE COURT: Sustained, Sustained. That

* * *

[201] is your present degree? A. Yes, I have both a bachelors degree in economics, which I earned at the University of Buffalo, and a PHD in economics which I earned at Brown University.

MR. EMCH: Your Honor, I am certainly willing to stipulate Mr. Raymond's qualifications.

MR. MILLER: Well, your honor, if we just might briefly have him go through his background, just take a minute. The jury will then know who it is that is speaking to them?

Q. Briefly, Dr. Raymond, will you go through your educational background and your various posts that you have held up to and including your present post? A. Well, as I indicated, I went to the University

of Buffalo and got a bachelors degree from Buffalo in 1959, then went to Brown and received a PHD in 1963 and since that time I have attended post-graduate training programs at Stanford, MIT and participated regularly in professional meetings and conferences.

I taught first at Brown University for a year then one year at Colby College up in Maine and then I came to West Virginia and spent five years in Morgantown. I was an assistant professor and later an

* * *

[244] A. Yes, sir.

Q. Were, I may have asked you this, were both of them working that evening? A. Yes, sir.

Q. Okay. Did, to your recollection from the time that you switched up 2, 2 and 1 at St. Albans and started up on river, did the, from that point on did the Morris Harvey and its tow ever have to stop for any reason up until the collision? A. Yes, sir, one time.

Q. When was that? A. That would be below the Charleston Levy, sir.

Q. Was it below or above the Elk? It was between the Levy and the Elk River, sir.

Q. Do you remember what the reason was for stopping the tow at that point? A. Yes, sir, there was a pleasure cruiser was out in the middle of the river and just floating there with no lights on.

Q. Were you able to see the pleasure cruiser with no lights on out in the middle of the river okay? [245] A. Yes, sir.

Q. Was there light on the water from various sources? A. Yes, sir.

Q. Did the street lights along the banks of the river add to the reflection of light down on the surface? A. Yes, sir, they did.

Q. As far as you were concerned, was there adequate light to see by with the naked eye? A. Yes, sir.

Q. Were the weather conditions clear? A. Yes, sir.

Q. Any fog at all? A. No sir.

Q. No rain, no drizzel? A. No rain, no drizzel, sir.

Q. Did the pilot house have an air-conditioner on it? A. Yes, sir.

Q. Was it working that evening? A. No sir. It wasn't working. We were in the pilot house, we had both the doors out on the starboard side and the port side was open.

Q. Were any of the windows open?

* * *

[249] A. Yes, sir.

Q. Was there any kind of marker or buoy set up that evening to mark off those anchored boats all along that starboard side of the river? A. Yes, sir. There was on the starboard side.

Q. And that would be? A. That would be on the right hand side, sir.

Q. That would be on the right hand side? A. Yes, sir.

Q. What color were those buoys? A. They was white, sir.

Q. Do you know who placed them? A. No, sir, I don't know who placed them.

Q. Do you, from your experience on the river, do you know who would normally be the organization that would place buoys and channel markers and things like that? A. To my knowledge, that would be the U.S. Coast Guard or the Coast Guard Auxiliary.

Q. All right. Did the pilot of the Morris Harvey, Mr. Hammack, have to cut speed one or more times after he passed the mouth of the Elk River in addition to stopping

for the vessel with no lights anchored in the channel? A. Yes, sir.

[250] Q. Hows many times did he stop? A. He didn't stop. He cut back a little on his throttle about one time, sir.

Q. What was the reason for that? A. That's when we was passing up through the Levy there, sir.

Q. And what was the reason for cutting back? A. Because the pleasure cruiser boats, sir. They was zig zagging back and forth across the head of the boat.

Q. How would you characterize the conditions on the Kanawha River between the Elk and the C & P boat dock as compared to say normal river navigation, recognizing this is a Labor Day Weekend we are talking about. Would you say it was light, medium, congested or heavily congested? A. I would say congested.

Q. Do you, let me ask you this, did either you or, no I'm going to back that up again. During the period of time just before the Morris Harvey collided with the pontoon boat, where were you and what were you doing? A. I was, at the time I was up in the pilot house standing on the port side. And we was coming up the river past the Levy and on up, Mr. Hammack was * * *

* * *

[252] Q. Is that nautical miles per hour? A. Yes, sir nautical miles per hour.

Q. Tell the jury the difference between a nautical mile and a statute mile, what's the fractional difference? A. That sir, I couldn't say. As I said before, I wasn't trained to be a pilot or anything, so I just don't know. It's from what I heard.

Q. When somebody says that a vessel is going two to

three knots, are they referring to nautical miles per hour? A. Yes, sir.

Q. And when you say two to three you mean nautical miles per hour, is that right? A. Yes, sir.

Q. Did either you or Mr. Hammack to your knowledge see the pontoon boat before the collision took place? A. No, sir, we dind't.

Q. Now do you know from your own knowledge and from what you, yourself, saw and oberved either before or after the collision what part of the front or what part of your tow came in contact with that pontoon boat? A. From the, when we picked the pontoon boat * * *

* * *

[254] Q. Okay. And that was on your starboard side, that is the Kanawha, the MacCorkle Avenue side of the river? A. Yes, sir, Maccorkle Avenue.

Q. Where do you think the actual collision took place with respect to the C & P boat ramp and South Side Bridge, Mr. Cogis? A. That, sir, I couldn't say.

Q. Could you say whether it was above or below the point in the river where that houseboat was located? A. I would say it could have been above it, sir.

Q. Okay. You are not sure, though? A. No, sir, I'm not sure.

Q. Okay. Before the collision to your recollection were you operating or scanning the radar, was that part of your duties? A. No, sir, it was not.

Q. That was over on Mr. Hammock's side? A. Yes, sir. That was on the starboard side of the pilot house.

Q. And would normally, would you normally have

been expected to scan the radar without orders from the pilot to do that? A. No, sir.

* * *

[255] the question, the explanation why you saw it.

MR. MILLER: I'm sorry if I said that I didn't mean it.

Q. Let me ask the question again, because I'm not trying to confuse you. In your mind, Mr. Cogis, as an experienced deckhand of mature years, do you think you know why it was that neither you nor Mr. Hammack saw the pontoon boat before the collision took place. Neither one of you saw it was I understand? A. Yes, sir.

Q. Do you know or do you think you know why not? A. No sir.

Q. Do you think that it was in the blind spot of your tow? A.It's a possibility.

Q. But you were over to the port side? A. Yes, sir.

Q. And the collision took place on the starboard side? A. Yes, sir.

Q. It wasn't on your side anyway? A. NO, sir.

Q. It was on Mr. Hammock's side? A. Yes, sir.

[256] Q. And he normally would have been the one who would be responsible for observing up the starboard side and out in front? A. Yes, sir.

Q. Mr. Cogis, I would like to hand you a document and give you a chance to look at that, that's a piece of paper that was supplied to us by Madison Coal and Supply Company. I won't tell you what it's suppose to be, but you look at it and tell me if you think, you know what it is or is not? A. Yes, sir, I do.

Q. What is it, sir? A. It's safety regulations and what the duties are of the captain, pilot, engineer deckhands.

Q. Was that or something very very similar to that in effect on August 31st, 1980, if you know, to the best of

your recollection? A. To the best of my recollection sir, I think it was.

Q. Okay.

MR. MILLER: Mr. Emch is there any objection.

MR. EMCH: No.

MR. MILLER: May it be received.

THE COURT: All right.

* * *

[273] LT. ARNE HEGGERS, PLAINTIFF'S WITNESS, SWORN DIRECT EXAMINATION

BY MR. MILLER

"Q. Was the motor disassembled when you saw it? A. I believe the casting was missing."

MR. MILLER: Casing.

" Q. Did you determine if there were any lights on the pontoon boat? "A. We looked for lights, yes.

"Q. Were there any? "A. There were lights on the pontoon boat.

"Q. Did they work? "A. The testimony indicated —

Q. Well let me ask the question. Did you, yourself, make an investigation personally to determine if the lights worked on the pontoon? "A. Yes.

"Q. Did they? "A. Yes.

"Q. Where were the lights located that worked? "A. The only lights that worked were the running lights, the red and green at that time.

"Q. Okay. And did you inspect — in the inspection of the pontoon boat, did that take place as soon as you came on the scene? [274] "A. There abouts, correct.

"Q. And you can't remember if you inspected it before or after you talked to Hammack and Copus? "A. Right. I can't recall which took place first.

"Q. But would the questioning of Hammack, Copus and the inspect of the pontoon boat all have taken place within an hour after you had arrived? "A. It was one of the first things we did.

"Q. Okay. Did you question anyone to determine whether the lights of the motorboat had been worked on subsequent to the collison and before you inspected the pontoon? "A. Yes. We asked if anything had been touched or moved.

"Q. And what was the response? "A. No.

"Q. Who did you ask? "A. The people on the tow boat.

"Q. Okay. Did you ask Mr. Kessinger if the lights on his boat were working before the collision? "A. Yes.

"Q. What did he tell you? "A. He said that the lights were working, that the lights were off because they drained the battery.

"Q. But you were able, but the battery had recharged itself, I guess, when you went to check it? "A. Just cause it drains the battery doesn't mean — * * *

[275A] * * * reference to Mr. David Estep, I believe, correct me if I'm wrong, page 51. There are many references to he, and they are referring to David Estep. Is that correct?

MR. EMCH: Where are you?

MR. MILLER: Page 51. I believe that's Dave Estep. Kessinger, all right. This is with reference to Mr. Kessinger. Line 4

"Q. Did he volunteer any information to you on that point? "A. I didn't — I don't think he, you know, indicated that they were hit by or, you know, couldn't get out of the way and they were hit, you know. I don't know in his mind, I don't know if he could tell whether or not the tow slowed down or not from his perspective.

"Q. How fast was the Morris Harvey traveling at the time the collision occurred? "A. Slow.

"Q. How fast in miles per hour? "A. We estimated three miles per hour.

"Q. Is that speed on water or speed on land.

"A. That would be speed on land."

MR. MILLER: Page 54. Part of that is on the previous page, starts out

"Q. --statement on page 2, 'the visibility was relatively good due to the street lighting along both banks of the river?"

* * *

[277] "Q. Did it ever enter your mind as to why Copus or Mr. Hammack could not similarly see the pontoon boat? "A. Yes.

"Q. It did? "A. Sure.

"Q. And "Q. And did you conclude that they could not have been able to see it, that they should not have been able to see it as a silhouette? "A. Now what was your question?

"Q. Did you determine that they should, that Hammack and Copus should have been able to see the silhouette of the pontoon from the light? "A. Right. At the time the barge or at the time the pontoon boat would have been silhouetted the pontoon boat probably would have to be in the blind spot of the tow.

"Q. Did you ever make a determination as to why the pontoon boat was not picked up on the Morris Harvey's radar? "A. Radars are --"

MR. MILLER Continuing the next

"A. Yeah, we "A. Yeah. We determined that the radar was on by the statement and that it was on at the time we were there. But, you know, sometimes radars don't pick up everything."

MR. MILLER: Turn to page 74, Line 1.

[278] "Q. You got to the scene of the accident what time in the morning? "A. At daylight. I don't recall specifically the time.

"Q. When you got there you tested the lights on board Mr. Kessinger's boat and the red and green running lights were operative? "A. Correct.

"Q. And there was power in the battery to operate them? "A. Correct.

"Q. The dome light that you referred to in your prior testimony had been sheered off in the accident, had it not? "A. The canopy was torn loose and it was connected to the canopy.

"Q. So likewise the dome light had been sheered off? "A. I believe so, yes.

"Q. So far as the other lights like the dome light that might have been attached to a canopy, your indication previously that you didn't know whether they worked or not, that was because they were no longer attached to the boat, is that corrrect? "A. Correct. There was no way of checking them actually.

"Q. That's right. But the lights that were attached to the boat did, in fact, work? "A. Yes. Now as to whether or not they met the requirements of visibility, I can't attest to that.

"Q. What time of day on the 31st did you first see Mr. Kessinger * * *

[279] * * * river to call for help to get it towed out of the river before he saw or before the Madison barge came up the river? "A. No. He didn't request assistance of anybody.

"Q. That's what he told you? "A. Correct.

"Q. So that at no time before the barge came up the river shortly before the collision, at no time before that barge, the Morris Harvey came up the river, at any time

before that did Kessinger according to his testimony at no time did he request or ask for any assistance to get pulled out of the river? "A. He didn't. He wasn't aware of the danger he was in. And thereafter, you know.

"Q. He made no such attempt to get out? "A. Right.

"Q. Is that correct? "A. Correct.

"Q. You have been in the Coast Guard since 1976, Lieutenant? "A. Well, I was at the Academy for four years prior to that.

"Q. So you are a graduate of the Coast Guard Academy? "A. Correct.

"Q. And additionally you have been in active duty since your graduation in 1976? "A. Correct.

"Q. What is the purpose of putting a lookout up on the front [280] of a tow? "A. Specifically on the front of a tow?

"Q. In congested areas, congested boat areas what would be the purpose of putting a lookout on the front of a tow in a congested tow area? "A. A lookout's job is to report anything that would adversely affect the navigation of the vessel.

"Q. What would be the specific purpose of putting one on the front of the tow when you were pushing a bunch of barges rather than let your lookout stand in the wheel house? "A. Well under conditions of reduced visibility it helps because he's going to have that much farther he can see ahead.

"Q. In areas of heavily boat congestion at night, do tow boats pushing barges frequently put lookouts on the front of the tow? "A. I don't know."

MR. MILLER: Line 5.

"Q. As well as you are also familiar with the notice of mariners published by the Coast Guard for the 10th Annual Sternwheel Regatta, is that correct? "A. Correct.

"Q. At the time of this accident the special local regulations were not in effect? "A. Correct.

"Q. This river and the main channel at the time and place of the accident were governed by the general Coast Guard [281] regulations? "A. Correct.

Q. And there were no specific prohibitions put out by the Coast Guard or by anybody else to restrict boats from being in the river according to the usual practices and rules of the road, is that correct? "A. Correct."

MR. MILLER: Page 84, line 8.

"Q. All right. I understand and I want to make sure when you tested the running lights the red and green lights, there was sufficient energy at the present time in the battery to make those lights burn? "A. Correct. Now whether or not, like I say they met the requirements of the regulations as to distance and visibility, I don't know.

"Q. Right. And you did this but there was enough energy in the battery to make them light up and you to see this, even in the day time? "A. Right."

MR. MILLER: Page 89, line 7.

"Q. And do you recall the names of those Charleston policemen? "A. No. There is, no—"

MR. EMCH: Objection. May we approach the bench. Do we need to, Mr. Miller?

MR. MILLER: No, you are right. Okay.

* * *

[283] "A. No.

"Q. Did you? "A. No.

"Q. You didn't feel they were? "A. No.

"Q. Okay. That's your feeling today? "A. Yes."

MR. STEWART: Page 63, 10th line.

"Q. Did you ever make a determination as to why the pontoon boat was not picked up on the Morris Harvey radar? "A. Radars are — yeah, we determined that

the radar was on by the statements and that it was on at the time we were up there, at the time they were there but, you know, sometimes radar don't pick up everything."

MR. STEWART: Page 75, line 15.

"Q. So as a practical matter you have no way of knowing from your personal observation whether Mr. Kessinger was drunk or sober at the time of the incident?
"A. No.

"Q. He may very well have been drunk? "A. Maybe, I don't know."

MR. STEWART: Page 78, line 14.

"Q. What would be the specific purpose of putting one on the front of the tow if you are pushing a bunch of barges rather than let your lookout stand in the wheel house? [284] "A. Well, under conditions of reduced visibility it helps because he's going to have that much farther he can see ahead."

MR. STEWART: Page 86, line 30.

"Q. At the time that his sister", referring to Kessinger's sister, "got off and into the other boat, did he indicated whether or not at that time they had attempted to start the engine at any time earlier that day without success or motor, I should say? "A. He indicated they had a hard time starting the engine.

"Q. Did he state whether or not they had actually gotten it started earlier that day? "A. I don't recall.

"Q. But he did indicate to you that by the time his sister got off the boat and into the motorboat with the operator of it that he was aware that they were having trouble with the engine? "A. Correct."

MR. STEWART: That will be all. Thank you, Mr. Hegger.

MR. MILLER: This is Lt. Junior Grade Elmo Lee Alexander, United States Coast Guard, one silver bar.

PLAINTIFF'S WITNESS ELMO LEE ALEXANDER, SWORN

DIRECT EXAMINATION

BY MR. MILLER

MR. MILLER: Line 4 page 84.

[285] "Q. I have one more.

Going back to the answer about the right of way of the kind of vessels. I believe your answer was that a pleasure craft was not to impede the path of a larger boat. In the case of a smaller boat which is incapacitated and floating helplessly in the water, what is the duty of a larger boat that appraoches a smaller boat in this situation. "A. Okay. If the vessel is disabled and shows signs of being disabled, then every other vessel should try to keep as clear as they can of that vessel showing signs of distress or signs her inability to maneuver. There is specific lights and shapes and stuff.

"Q. If is disabled vessel has no lights or no means of producing lights, what the recommended way of showing distress? "A. If she has no lights to begin with and had no way of my producing my kind of light, she shall make herself known, you know, there is distress signals. There is a whole page of different signals that she can give, different hand signals, making sounding a whistle. There is a whole list of actions that she can take to make herself known.

"Q. Where would you find that list? "A. In the rules of the road.

CROSS-EXAMIANTION

BY MR. STEWART

"Q. If you know again, Lt. Alexander, operating a large * * *

* * *

[301] Q. Based upon all of the foregoing have you arrived at certain expert professional opinions regarding the effective causes of the collision of the MV Morris Harvey and the private pleasure boat West Virginia Number 7830 AB owned by Paul Kessinger in this case?

THE COURT: Let me see if I have your question back. You are saying the cause. The cause or causes.

MR. MILLER: Effective causes, Your Honor. I'm sorry if I said cause. I meant the effective causes.

Q. Have you arrived at such opinions? A. Yes, sir.

Q. What are those opinions? A. Well, the pontoon boat was a propelled vessel that was not capable of propulsion due to the fact they could not start the engine. It was drifting in the river. The tug and tow was up bound in the river. The tug and tow prior to getting to the South Side Bridge sighted an unlighted vessel and stopped for it, allowed it to get out of the way then proceeded further up the river, and for some reason did not sight the pontoon boat and proceeded up the river to the point of collision.,

Q. Do you have an opinion as to the effective cause or causes of that collision? A. Yes, sir, I do.

Q. What is that opinion? A. That the tug and tow failed to carry out the proper [302] lookout.

Q. Would you please explain to the jury the specific basis for your opinion that the MV Morris Harvey and its tow failed to maintain a proper lookout? A. The Coast Guard had broadcast a notice to mariners suggesting when vessels were transiting through crowded areas that they put a lookout at the head of a tow. This to my knowledge was not done and no attempt was made by the tow boat to look into the blind spot that they had in front of them at all times as they proceeded up the river.

Q. Captain Hofstra, have you prepared an illustrative

sketch to illustrate the blind spot which in your opinion existed between the MV Morris Harvey and its tow in the early monring hours of August 31st, 1980 immediately prior to this collision? A. Yes, sir, I prepared a rough sketch.

Q. I am going to hand you a document that's been marked as Plaintiff's Exhibit 23 for identification and I'll ask you if that is your sketch illustrating the blind spot? A. Yes, sir.

MR. MILLER: Mr. Emch, would you care to examine it here or would you like me to spread it out over there.

MR. EMCH: I don't care.

MR. MILLER: You want to examine it.

MR. EMCH: I would like to look at it.

MR. MILLER: Go ahead and explain to him, explain to

* * *

[303] A. Yes, sir.

Q. I didn't want the jury to think I am being unfair with you. Is it your contention, Mr. Hofstra, for the jury that a lookout on the head of the two would — I mean you are certain they would have seen the pontoon boats?

A. I have no knowledge of what they would have seen. The probability of their being capable of seeing is what I'm testifying to, sir.

Q. So they might have, Might have seen it? A. I presume that. They saw the other one.

Q. I mean a lookout on the head of a tow, is it your testimony that they might have seen it? A. My testimony is that the possibility exists for them to see it. If the man goes to sleep, he can't see it. If he's an alert lookout at the head of a tow, he should see it, yes.

Q. Okay. So you cannot testify that he would see it only that he should or he could? A. I believe I just answered that, sir.

Q. Is it your contention even if we see, if we assume that he would have, would have seen it, if there were a lookout at the head of the tow is it your contention that, in fact, they would have been able to avoid the collision? A. I believe so. I believe that the testimony that I have read in depositions and also others that they could stop this tow boat in 5200 feet.

[304] Q. Well, we were talking about how far they could see. Did you read the testimony about how close other people had to get to the pontoon boat who were right at eye level? A. Whose testimony are you talking about sir.

MR. MILLER: I don't know which testimony.

MR. EMCH: Assume there was.

MR. MILLER: Which testimony.

MR. EMCH: I am asking him to assume there was testimony in the case from people who were in boats on the water with the pontoon boat the hour or so before this accident who said that they had to get very close to it when it didn't have lights before they say it.

Q. Okay, would that change your view about how far the lookout would be able to see if you were out at the head of the tow. A. If you would like me to assume its pitch black and he can't see his hand in front of him, I will assume that, whichever you want me to assume.

Q. I only asked you to assume that people on the river said that they had to get very close. A. The testimony that I have read and the depositions I have read don't leave the impression in any way shape or fashion?

Q. And you won't assume that for me? A. I would assume anything you desire.

Q. Okay. And in that instance then, would that change your opinion of the ability of this lookout maybe to see a pontoon [305] boat in time to stop, say it was only 50 feet before he could see it? A. Then the testimony that I

have read that the vessel can stop within 50 to a hundred feet – it depends on whether it was 50 to a hundred feet. If it can stop in 50 feet and they saw it at 50, theoretically they would stop at the point of impact.

Q. Am I correct then, you haven't seen any testimony or haven't been told about any where it was stated by people on the river that they had to get very close to the pontoon boat before they could even see it? A. To my knowledge, I have read the testimony of all the witnesses to this collision. There is no testimony other than that, to my knowledge.

Q. The "very close" you do remember that? A. No.

Q. You don't remember that. All right. Is it your contention, Mr. Hofstra, with your diagram here that the pilot on board the Morris Harvey couldn't see in front of his tow? A. That's correct.

Q. I mean he couldn't see out here any where on the water in front of his tow? A. He cannot see an object on the surface of the water anywhere within that blind spot.

Q. Well, I'm talking about in front of the blind spot? A. In front of the blind spot he can see it, yes, sir.

* * *

[313] Q. Is this the Coast Guard report, Mr. Hofstra, that you reviewed? A. No. It's not the one that I reviewed.

Q. Well, have you reviewed a document with that information in it? A. Now it's beginning to look familiar.

Q. Did you review that? A. I believe so, yes, sir.

Q. Let me direct your attention refresh your recollection to this paragraph. Did the Coast Guard disagree with your computation of the blind spot? A. "Creating a blind spot ahead of the tow of about 650 feet."

Q. 650 feet. A. I don't know what he's talking

about. Is he talking about that the pontoon boat is going to disappear at 650 feet or is he talking a blind spot?

Q. I don't know? A. Neither do I.

Q. He didn't say the pontoon boat would disappear. The report says a blind spot of approximately 650 feet? A. Unqualified, yes, sir.

Q. And your testimony of the blind spot is 960 feet? A. Yes, sir.

Q. Is there any requirement to your knowledge, regulatory or otherwise, Mr. Hofstra, that requires the posting of a lookout * * *

* * *

[322] Q. Well, I will get back to the radar? A. Oh, okay.

Q. But the number was very close and, of course, it's a matter of eye level, which would also be determined by the height of the pilot and what have you? A. Oh, his height.

Q. The taller pilot — Did you then calculate on the basis of this information, and again using the tow with the five jumbo barges two by two and then one on the starboard side and the Morris Harvey faced up to that, did you calculate the blind spot at the head or the point of the head of the tow? A. Yes, I did. In regard to from where the pilot was standing out to the coning of the barge, which amounted to just right at 600 feet.

Q. Was the blind spot 600 feet? A. Very close to it. Very close to — that's where it started at the head of the tow, maybe 15 feet back towards the boat was the coning and the blind spot started there and went forward about 600 feet is what I came up with. But if you put the pontoon boat in there and the height that the pontoon —

Q. Which you assumed at what, how high did you assume the pontoon? A. I assumed the pontoon boat was some place between 9 and 10 feet, I used it as 9 feet,

trying to be conservative, and you should have been able to see the yellow top on that boat at 200 * * *

* * *

[350] A. Yes, sir. Unfortunately too many bodies with blood alcohol with a consideration, yes, sir.

Q. You do that very routinely? A. Yes, sir, as part of medical-legal death investigation.

Q. And have during all of the 8 years that you have been Chief Medical Examiner? A. Yes, sir, that is correct, yes, sir.

Q. Again, Doctor, let me ask you if you can characterize, based on your experience a .22 blood alcohol level to the jury? A. The .22 percent blood alcohol level would represent, can I use the reference to legal intoxication of a motor vehicle operator.

MR. MILLER: Your Honor, I object. May we approach the bench.

THE WITNESS: All right, sir. I will stay away from that.

THE COURT: All right. Go ahead and answer it, that will be all right.

THE WITNESS: It would be all right in that reference.

THE COURT: Yes, sir.

THE WITNESS: All right .22 percent represents over twice the amount of alcohol allowed under the law in the State of West Virginia whereby one can operate a motor vehicle without being considered impaired to operate such a motor vehicle. And that is if a person has point 10 percent, point [351] 10 percent or greater alcohol in their bodies while operating a motor vehicle, then they, if arrested and tried, are legally impaired and intoxicated to operate a motor vehicle, that is point 10 percent. In this particular, this is not a motor vehicle situation, but the blood showed an alcohol level in Mr. Ratliff of .22 percent, which is over twice as much alcohol in the blood of

Mr. Ratliff. And if he had been driving a motor vehicle, which, of course he wasn't, he wuld be considered intoxicated, to say the least.

Point 22 percent, to place another reference, would be roughly equivalent to let's say 15 cans of beer consumed over a 4 hour period. I'm not saying that this individual had, in fact, consumed 15 cans of beer in 4 hours, it might have been many more cans over 8 hours or it may have been a few less cans in two hours. But that is the magnitude of the type of alcohol level we are seeing, namely in the neighborhood of about 15 cans of beer over a 4 hour period, if one were to be able to consume that quantity of beer or on the other hand, 15 one ounce shots of whiskey in a 4 hour period.

MR. MILLER: Your Honor, at this point I will renew my objection and move the Court to ask the jury to disregard the references to the State of West Virginia Motor Vehicles Laws or in the alternative that the Court instruct the jury that those laws — there are no state or federal laws which pertaining to consumption of alcoholic beverages on the navigable water ways * * *